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No. 97-1837

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CHAPARRAL STEEL COMPANY,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Tenth Court of Appeals for the State of Texas

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PETITIONER'S REPLY MEMORANDUM

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INTRODUCTION

Respondent State of Texas' *Brief in Opposition* relies extensively on a single, unsupported premise: that a settlement reached between petitioner Chaparral Steel Company and the Occupational Safety and Health Administration somehow converted a citation for violation of two separate federal standards into a citation only for violation of the "general duty clause" contained within the Occupational Safety and Health Act, 29 U.S.C. § 654(a). Respondent's faulty premise contradicts both the opinion of the Tenth Court of Appeals for the State of Texas, which is the order at issue, and OSHA's own records.

ARGUMENT ON REPLY

A. Respondent State of Texas argues that the settlement reached between petitioner and OSHA deletes a prior citation for violation of 29 C.F.R. § 1910.145(c)(3) and rests entirely on violation of the OSH Act's general duty clause.

As drafted by respondent State of Texas, the *Question Presented* in this case involves "a prior settlement agreement between an employer and the Department of Labor based on a violation of the general duty clause of the Occupational Safety and Health Act." *Respondent's Brief in Opposition* ("Opp.") at page (i). According to the State of Texas, "the settlement was based on a violation of [29 U.S.C.] § 654, the general duty clause of the OSH Act, which provides that an employer shall keep a safe workplace." Opp. at 9.[1] From this premise, the State of Texas argues that the general duty clause "is not a preemptive standard but rather a provision to fall back on where no promulgated standards apply." Opp. at 9-10 (emphasis omitted).

B. Respondent's premise contradicts the Texas Tenth Circuit Court of Appeals' findings.

Respondent's premise—that the settlement reached between Chaparral Steel Company and OSHA was based solely on the OSH Act's general duty clause and not also on 29 C.F.R. § 1910.145(c)(3)—does not accurately reflect the Texas Tenth Court of Appeals' ruling in this case. The Texas court acknowledged that Chaparral Steel Company settled the entire underlying OSHA citation, which identified both the general duty clause and the specific standard set forth at 29 C.F.R. § 1910.145(c)(3), by reaching a settlement and agreeing to both fines and

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[1] *Also see* Opp. at 3 ("the [parties] subsequently agreed to a settlement of this citation as a violation of the general duty clause").

affirmative remedial action. *Petitioner's Appendix* ("Pet. App.") at 4a, 31a.

C. Respondent's premise also misinterprets the *Settlement Agreement* reached between Chaparral Steel Company and OSHA.

1. The *Settlement Agreement* reached between Chaparral Steel Company and OSHA continues to cite violation of *both* the general duty clause and the specific standard set by 29 C.F.R. § 1910.145(c)(3).

Respondent's premise also misinterprets the settlement reached between Chaparral Steel Company and OSHA. The *Settlement Agreement* amended "Item 1" of the citation to include an erroneously omitted reference to the OSH Act's general duty clause. *See* Citation Item Number 01 (Pet. App. 30a at No. 2). It did not amend "Item 2" of the citation, which identified the basis for a second citation as "29 CFR 1910.145(c)(3)." *See* Citation Item Number 02 (Pet. App. 31a at Nos. 12, 13). The State of Texas is confused by the language amending Citation Item No. 01, perhaps because it was not a party to the *Settlement Agreement*. But a careful reading of the *Settlement Agreement* shows that it did not *delete* the original citation's reference to 29 CFR § 1910.145(c)(3) despite *adding* an express reference to the OSH Act's general duty clause.

2. OSHA's records confirm that the *Settlement Agreement* reached between Chaparral Steel Company and OSHA did not dismiss the citation for violation of 29 C.F.R. § 1910.145(c)(3).

OSHA's own records confirm that the State of Texas has misinterpreted the *Settlement Agreement*. These records are maintained in an extensive database and are available via OSHA's Internet site. That database contains a comprehensive Establishment Search Inspection Detail ("ESID") describing events following its inspection

of conditions at Chaparral Steel Company's Midlothian facility.[2]

The ESID contains a "violation summary" including, at its top, a section indicating two "Nr Violations." These violations are set forth in a section titled "Violation Items," which includes a description of each violation found, cited and penalized. This section identifies two separate violations, including violations of *both* the general duty clause *and* 29 C.F.R. § 1910.145(c)(3). The "Inspection Detail Definitions" indicate quite clearly that the standards identified under "Nr Violations" do not include "violations which were deleted due to a settlement or judicial action."[3]

Another form from the database, titled "Violation—Chaparral Steel Company," explains that petitioner was cited for a violation of section 1910.145(c)(3) and that, on the date that the violation was settled, the penalty for violation was reduced from $5,000 to $2,500—half the total penalty paid under the settlement agreement.[4] A similar page describes the initial citation for violation of the general duty clause and its subsequent settlement for a separate $2,500 penalty.[5]

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[2] This "Establishment Search Inspection Detail" can be viewed directly at http://www.osha.gov/cgi-bin/est/est1xp?i=103371662. A printed copy of this web page has been lodged for the Court's convenience as Exhibit A to the *Items Lodged in Support of Petitioner's Reply Memorandum.*

[3] The "Inspection Detail Definitions" can be viewed directly at http://www.osha.gov/oshstats/est1def.html. A printed copy of this web page has been lodged for the Court's convenience as Exhibit B to the *Items Lodged in Support of Petitioner's Reply Memorandum.*

[4] This "Violation Information" can be viewed directly at http://www.osha.gov/cgi-bin/est/est1vd?10337166201002. A printed copy of this web page has been lodged for the Court's convenience as Exhibit C to the *Items Lodged in Support of Petitioner's Reply Memorandum.*

[5] This "Violation Information" can be viewed directly at http://www.osha.gov/cgi-bin/est/est1vd?10337166201001. A printed copy

Accordingly—despite the State of Texas' confusion on this issue—OSHA's own records clearly indicate that, in the settlement, Chaparral Steel Company agreed not to contest and paid penalties on citations for violation of *both* the general duty clause *and* the specific federal standard set by 29 C.F.R. § 1910.145(c)(3).

CONCLUSION

As demonstrated above, and despite the State of Texas' attempt to recharacterize the citations levied against Chaparral Steel Company by the federal Occupational Safety and Health Administration, this case does not involve a *Settlement Agreement* based solely "on a violation of the general duty clause of the Occupational Safety and Health Act." Rather, this case involves citations issued under both the general duty clause and the specific standard set forth at 29 C.F.R. § 1910.145(c)(3). Because application of the latter standard preempts Texas' attempt to regulate the same conditions under state law, and for each of the reasons set forth in its opening brief, Chaparral Steel Company respectfully requests that its *Petition for Writ of Certiorari* be granted.

Respectfully submitted,

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of this web page has been lodged for the Court's convenience as Exhibit D to the *Items Lodged in Support of Petitioner's Reply Memorandum.*